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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF ALASKA
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8 FRANCIS SCHAEFFER COX,

9 Petitioner,

10 v.

11 UNITED STATES OF AMERICA

12 Respondent.
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CASE NO. CR11-00022RJB

ORDER DENYING MOTION FOR
WRIT OF AUDITA QUERELA
PURSUANT TO ALL WRITS
ACT, 28 U.S.C. § 1651

14 This case comes before the court on the above-referenced motion (Dkt. 704). The court
15 is familiar with the records and files herein, all documents filed in support of and in opposition to
16 the motion, the events of the trial, and is fully advised. For the reasons stated herein, the motion
17 should be denied.

18 After a lengthy trial with two co-defendants, Mr. Cox was convicted by a jury of seven
19 firearm counts, a conspiracy count, and a solicitation count. He was acquitted by the jury of two
20 firearms counts (*see* Verdict Form, Dkt. 432). He appealed his convictions and the Ninth Circuit
21 Court of Appeals affirmed all convictions with the exception of the charge of Solicitation to
22 Murder Federal Officers. That sole conviction was reversed, and the matter was remanded to the
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1 District Court for resentencing (*see* Ninth Circuit Memorandum Opinion in Ninth Circuit Cause
2 Number 13-30000, Dkt. 683).¹

3 Following issuance of the Ninth Circuit’s Memorandum Opinion, Mr. Cox petitioned for
4 rehearing and for rehearing *en banc*. Those petitions were denied (Dkt. 687), and on November
5 15, 2018, the Mandate was issued (Dkt. 688).

6 The matter has been set for resentencing before the undersigned on May 30, 2019.

7 Petitioner describes the procedure that would lead to the issuance of a writ of *audita*
8 *querela* as follows:

9 According to the Ninth Circuit, “the writ of *audita querela* can only be available where
10 there is a *legal* objection to a conviction which has arisen subsequent to that conviction,
11 and which is not redressable pursuant to another post-conviction remedy.” *Doe v INS*,
120 F.3d 200, 204 (9th Cir. 1997) (quoting *United States v Holder*, 936 F.2d 1, 5 (1st Cir.
1991)(emphasis in original).

12 Petitioner alleges further that,

13 Such a legal objection arose in Mr. Cox’s case when the Ninth Circuit vacated Count 16
14 of the judgment, solicitation of others to engage in the murder of an officer or employee
15 of the United States, on jurisdictional grounds – specifically, “because the federal ‘hit
team’ that the security team was supposed to guard against [at the television station
KJNP] did not exist.”

16 Dkt. 704 at 1-2 (citing Ninth Circuit’s Memorandum Opinion, Dkt. 683 at 4).

17 Petitioner argues, “That jurisdictional holding, in turn, cracked the foundation of the
18 jury’s verdict on the conspiracy count.” Dkt. 704 at 2.

19 Mr. Cox’s argument fails on a number of grounds: First, the elements of the solicitation
20 count and the conspiracy to murder count are very different. *See* Court’s Instructions to the Jury,
21 Dkt. 430, Instruction Number 46, re: Conspiracy to Murder Officers and Employees of the
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23 ¹ Citations to Ninth Circuit documents are to the District Court docket numbers where
24 they can be found.

1 United States, and Instruction Number 52, re: Solicitation to Murder an Officer of the United
2 States. The grounds for reversal of the solicitation charge did not “crack the foundation of the
3 jury’s verdict” on the conspiracy count.

4 Second, the basic argument that the solicitation charge and the conspiracy charge should
5 have been treated the same way by the Ninth Circuit is undermined by the Ninth Circuit’s
6 Memorandum Opinion, Dkt. 683, which makes it clear to this court that the Ninth Circuit court
7 considered the argument Petitioner now makes regarding the actual existence of targets of the
8 conspiracy and of the solicitation.

9 Third, the argument that the Ninth Circuit’s opinion gave rise to a new argument for
10 attacking the conspiracy count did not arise after the Petitioner’s final conviction, which
11 occurred with the issuance of the Mandate (Dkt. 688) after the Petitioner had the opportunity to
12 move for rehearing and rehearing *en banc*, in the Ninth Circuit (Dkt. 687). His conviction was
13 final after that opportunity for rehearing and rehearing *en banc*, when the Mandate was issued on
14 November 15, 2017 (Dkt. 688).

15 Fourth, the Ninth Circuit, in its Memorandum Opinion (Dkt. 683), carefully considered
16 the sufficiency of the evidence in the case, as well as the jury instructions, and to now grant the
17 Petitioner’s Motion for a Writ of *Audita Querela* would be to reverse the opinion of the Ninth
18 Circuit. That, a trial judge cannot do.

19 The undersigned respectfully declines to re-examine the evidence in the case and the jury
20 instructions as the pleadings in support of and in opposition to the motion seem to urge. This
21 motion appears to be an attempt to re-litigate the sufficiency of the evidence and the accuracy
22 and sufficiency of the jury instructions, which this court should not do. The Petitioner’s
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1 conviction was finalized with the Mandate of the Ninth Circuit, and no legal objections to that
2 conviction have arisen after the finalized conviction.

3 The Motion for Writ of *Audita Querela* Pursuant to All Writs Act, 28 U.S.C. § 1651
4 (Dkt. 704) is DENIED.

5 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
6 to any party appearing *pro se* at said party's last known address, and to the Probation Office.

7 Dated this 26th day of February, 2019.

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10 ROBERT J. BRYAN
11 United States District Judge
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